

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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SHANA L. CROWE

Plaintiff,

v.

NANCY A. BERRYHILL, et al.,

Defendants.

Case No. 2:17-cv-02897-RFB-CWH

ORDER

INTRODUCTION

Before the Court are three motions: Defendant Nancy A. Berryhill's Motion to Alter or Amend Judgment (ECF No. 22), Plaintiff's Motion for Order to Show Cause (ECF No. 28), and Plaintiff's Motion for Status of the Case (ECF No. 33). For the reasons stated below, Defendant's Motion to Alter or Amend Judgment is denied and Plaintiff's Motion for Order to Show Cause is granted.

I. BACKGROUND

The Court incorporates by reference the facts and procedural history as iterated in its July 24, 2019 Order (ECF No. 20) and emphasizes the following:

On February 11, 2014, Plaintiff completed an application for disability insurance benefits and supplemental security income alleging disability since September 2, 2013. AR 101. Plaintiff was denied initially on July 24, 2014 and upon administrative reconsideration on February 19, 2015. AR 101. After a hearing, where Plaintiff amended her alleged onset date to December 1, 2015, ALJ Norman L. Bennett issued a decision on July 5, 2016 finding Plaintiff was not disabled.

1 AR 101–09. The Appeals Council denied Plaintiff’s request for review on February 27, 2017,
2 rendering the ALJ’s decision final. AR 1–4. The ALJ found that “Plaintiff has not engaged in
3 substantial gainful activity since December 1, 2015” and that she had severe impairments that
4 nevertheless did not “meet or medically equal a listed impairment.” AR 103–04. The ALJ
5 concluded that Plaintiff had the residual functional capacity (“RFC”) to perform a range of light
6 work outlined in 20 C.F.R. § 404.1520(a) and § 416.920(a), and that while Plaintiff would not be
7 able to perform any past relevant work, the ALJ concluded that she could perform the work of a
8 ticket taker, garment sorter, and office helper. AR 107–08.

9 The Court adds the following background information:

10 On November 17, 2017, Plaintiff commenced this case by filing an application to proceed
11 in forma pauperis to which she attached a Complaint. ECF Nos. 1, 1-1. The Court approved
12 Plaintiff’s Application and filed the Complaint to the docket. ECF Nos. 3, 4. On May 23, 2018,
13 Defendant filed an Answer. ECF No. 10. On July 24, 2018, Plaintiff filed a Motion to Remand to
14 the Social Security Administration. ECF No. 17. On August 23, 2018, Defendant filed a
15 Countermotion to affirm the Agency’s Decision. ECF No. 18.

16 On July 24, 2019, the Court issued an Order granting Plaintiff’s Motion to Remand and
17 denying Defendant’s Countermotion to Affirm. ECF No. 20. The same day, the Clerk of Court
18 issued an Order of Judgment and closed the case. ECF No. 21.

19 In its Order, the Court first found that the ALJ erred in according limited weight to the
20 opinions of non-examining State agency physicians Judy Panek, M.D. and Navdeep S. Dhaliwal,
21 M.D. Specifically, the medical opinions of Dr. Panek and Dr. Dhaliwal were “entirely consistent”
22 with the ALJ’s residual functional capacity (“RFC”). ECF No. 20 at 5. To the degree the ALJ
23 discredited Dr. Dhaliwal’s opinion based on Dr. Dhaliwal’s finding that Plaintiff could stand
24 and/or walk only two hours in an eight-hour workday, the Court held that “the ALJ referenced no
25 specific evidence in the medical record as a basis to reject this opinion The ALJ adopted the
26 less restrictive limitation on standing and/or walking in the RFC finding but failed to reconcile this
27 conflict in the medical testimony.” *Id.* at 5-6.

28 The Court next found that the ALJ violated his responsibility to ask the vocation expert at

1 the hearing about any conflict between the expert’s testimony and the Directory of Occupational
2 Titles (“D.O.T.”) and to obtain a reasonable explanation for any apparent conflict. Id. at 6. Instead,
3 “[i]n the ALJ’s written decision, the ALJ erroneously stated that ‘the vocational expert’s testimony
4 is consistent with the information contained in the Dictionary of Occupational Titles.’” Since it
5 was “both possible and foreseeable that the identified jobs would not permit an employee to
6 perform the work in a seated position for half of the workday at a minimum, as Plaintiff’s RFC
7 requires[,]” and “Plaintiff’s limitations restrict Plaintiff to less than the full range of light work,”
8 the Court found that the ALJ “failed to follow up with the vocational expert regarding which
9 elements of his testimony were inconsistent with the D.O.T. and how the inconsistencies could be
10 reconciled.” Id. at 7. The Court held that under Sims v. Apfel, 530 U.S. 103, 112 (2000) (plurality),
11 Plaintiff had not waived this argument because she did not have to exhaust issues before the
12 Appeals Council to preserve them; furthermore, Plaintiff raised arguments before the Appeals
13 Council regarding alleged discrepancies between the D.O.R. and the vocational expert’s testimony.
14 Id. at 8.

15 Finally, the Court held that the ALJ did not sufficiently substantiate his conclusion that
16 Plaintiff’s symptom reports were inconsistent with the record. Id. at 9. The ALJ held that Plaintiff’s
17 functional limitations went beyond that which the medical evidence could support, and that
18 Plaintiff’s pain treatment was “limited to conservative modalities” “with no recommendation for
19 surgical intervention.” Id. (citing to AR106). The Court found that the ALJ’s analysis did not
20 contain specific, clear, and convincing reasons for rejecting Plaintiff’s testimony regarding the
21 severity of her symptoms; the ALJ “stated generally that the medical evidence of record did not
22 support consistent work-related functional limitations to the degree alleged by Plaintiff” and
23 improperly used evidence of a conservative treatment plan as “evidence of lesser symptomology”
24 even though Plaintiff had not responded favorably to the conservative treatment. Id. The Court
25 found that these errors were not harmless. Id. at 10. Finally, the Court applied the three-part test
26 enshrined in Garrison v. Colvin, 759 F.3d 995, 1020 (9th Cir. 2014) and held that “the record [had]
27 been fully developed and further administrative proceedings would serve no useful purpose.” Id.
28 at 11. The Court “remanded to Defendant Nancy A. Berryhill, Acting Commissioner of Social

1 Security, for an award of benefits with an onset date of December 1, 2015.” Id.

2 On August 21, 2019, Defendant filed a Motion Objecting to the Report and
3 Recommendation of the Magistrate Judge, which was later corrected to be a Motion to Alter or
4 Amend Judgment. ECF No. 22. The Court construes the motion to be a Motion for Reconsideration
5 of the Court’s July 24, 2019 Order. On March 31, 2022, Plaintiff filed a Motion for an Order to
6 show cause why the Commission had not complied with the Judgment of the Court. ECF No. 28.
7 On April 15, 2022, the Motion was fully briefed. ECF Nos. 29, 30. On February 2, 2023, Plaintiff
8 filed a Motion for Status Update. ECF No. 33. On March 31, Plaintiff filed a Notice of New
9 Authority. ECF No. 35. This Order follows.

11 II. LEGAL STANDARD

12 a. Motion for Reconsideration

13 A motion for reconsideration is treated as a motion to alter or amend judgment under
14 Federal Rule of Civil Procedure Rule 59(e) if it is filed within 28 days of entry of judgment.
15 "Otherwise it is treated as a Rule 60(b) motion for relief from a judgment or order." Am. Ironworks
16 & Erectors Inc. v. N. Am. Constr. Corp., 248 F.3d 892 (9th Cir. 2001); Herron v. Wells Fargo Fin.
17 Inc., 299 Fed. App’x 713 (9th Cir. 2008).

18 The “four basic grounds upon which a Rule 59(e) motion may be granted [are]: (1) if such
19 motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if
20 such motion is necessary to present newly discovered or previously unavailable evidence; (3) if
21 such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an
22 intervening change in controlling law.” Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir.
23 2011) (citing McDowell v. Calderon, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (en banc) (per
24 curiam) (internal quotation marks omitted)).

25 “Whether or not to grant reconsideration is committed to the sound discretion of the court.”
26 Navajo Nation v. Confederated Tribes and Bands of the Yakama Indian Nation, 331 F.3d 1041,
27 1046 (9th Cir. 2003). Generally, “a motion for reconsideration should not be granted, absent highly
28 unusual circumstances” Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d

1 873, 880 (9th Cir. 2009) (internal quotation and citation omitted).

2 A motion for reconsideration “may not be used to raise arguments or present evidence for
3 the first time when they could reasonably have been raised earlier in the litigation.” *Id.* (internal
4 quotation and citation omitted). Moreover, “[m]otions for reconsideration are disfavored. A
5 movant must not repeat arguments already presented unless (and only to the extent) necessary to
6 explain controlling, intervening law or to argue new facts. A movant who repeats arguments will
7 be subject to appropriate sanctions.” LR 59-1.

8 9 **III. DISCUSSION**

10 **A. Defendant’s Motion for Reconsideration and Plaintiff’s Order to Show** 11 **Cause**

12 Defendant seeks that the Court amend its July 24, 2019 Order to remand for further
13 proceedings, not for immediate payment of benefits. Specifically, Defendant argues that there are
14 manifest errors of law or fact in the Court’s July 24, 2019 Order. For the reasons stated below, the
15 Court denies Defendant’s motion for reconsideration.

16 First, Defendant argues that the Court did not apply the “ordinary remand rule” i.e.
17 remanding for “further proceedings” after finding reversible error. Defendant argues that pursuant
18 to Ninth Circuit precedent, a remand for further proceedings is required here, as the record contains
19 no medical evidence that Plaintiff is conclusively disabled, and a Court cannot find disability based
20 on subjective testimony alone. Defendant further argues that even if the Court credits Dr.
21 Dhaliwal’s opinion as true, the opinion alone, the most restrictive medical opinion in the record,
22 does not establish disability. No medical source opined that Plaintiff experienced disabling
23 symptoms and, at the very least, additional vocational evidence is required to determine whether
24 Plaintiff could perform jobs that existed in significant numbers in the national economy.

25 Second, Defendant argues that the vocational expert did not opine that there were no jobs
26 Plaintiff could perform if she was restricted to working only two hours on her feet; moreover, the
27 Grids show that Plaintiff is not disabled, largely because of her young age, and an ALJ is not
28 allowed to avoid applying a Grid Rule that is determinative.

1 Defendant urges the Court to remand the case to the ALJ so that he may consider the
2 vocational effect of medical opinions on Plaintiff's ability to work.

3 Plaintiff did not respond to the Motion, and instead filed an Order to Show Cause why
4 Defendant had not complied with the judgment of this Court. ECF No. 28. Plaintiff argues that
5 while the Motion for Reconsideration was pending, Defendant was required to comply with the
6 Court's judgment; Defendant did not seek a stay. Furthermore, Defendant did not seek resolution
7 of the motion, and under Local Rule 41-1, the Court, in its discretion, can dismiss the Rule 59(e)
8 motion for want of prosecution. Defendant counters that Plaintiff did not oppose Defendant's
9 Motion for Reconsideration, and that because the Motion was timely, it suspended the finality of
10 the judgment of the Court in the July 24, 2019 Order. Plaintiff replies that Defendant fails to
11 substantiate the proposition that a Rule 59(e) motion stays judgment for any purpose except appeal;
12 therefore, by failing to request a stay, Defendant was required to provide Plaintiff with benefits or
13 interim benefits. This Defendant did not do. Furthermore, Defendant failed to notify the Court that
14 its Motion for Reconsideration was pending for 34 months.

15 The Court first notes that Defendants erroneously filed their pending Motion as an
16 Objection of the Magistrate Judge's Order, and the case had been closed due to the Court's July
17 24, 2019 Order. Additionally, the Magistrate Judge assigned to the matter retired during the 28-
18 day period between the filing of the Court's Order and the filing of Defendant's Motion. The
19 parties reached out to the Court only in 2023 to notify the Court of the pending Motion.

20 The Court does not find that reconsideration of its prior order is warranted in this case.
21 Furthermore, Defendant has the burden of showing why reconsideration, which is "disfavored,"
22 should be granted here; it has not carried its burden. See LR 59-1.

23 First, the Court applied binding Ninth Circuit precedent to assess what the ALJ should do
24 on remand; pursuant to Garrison, the Court ordered the ALJ to award benefits on remand, finding
25 that there were no pending relevant factual disputes requiring adjudication. Defendant argues that
26 even under Garrison, the Court must remand for further administrative proceedings because there
27 is serious doubt as to disability on the record. The Court disagrees.

28 Second, although the ALJ is not allowed to "avoid" a Grid Rule that is determinative, a

1 review of the administrative record shows that the Grid Rule was not at issue during the
2 administrative proceedings. The Court may not affirm the ALJ on a ground on which the ALJ did
3 not rely. Garrison, 759 F.3d at 1009–10.¹

4 The Court now turns to Plaintiff’s Motion for an Order to Show Cause. Defendant is correct
5 that a Rule 59(e) motion eliminates the finality of the earlier judgment for the purposes of appeal.
6 Banister v. Davis, 140 S. Ct. 1698, 1704 (2020). However, Rule 59(e) motions do not stay the
7 judgment. 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2903 (3d
8 ed.) (“A posttrial motion, seeking a new trial or some similar kind of relief, does not stay the
9 judgment.”). Rather, “if a posttrial motion is made, the Court ‘is given discretion in Rule 62(b) to
10 stay execution or enforcement of the judgment pending disposition of the motion.’” Id. While no
11 bond, obligation, or security is required to stay the enforcement of a judgment pending a motion
12 by the United States, the decision to grant a stay on the judgment under Rule 62 remains within
13 the discretion of the Court. See Fed. R. Civ. P. 62(e). To date, Defendant has not filed a Rule 62
14 motion for a stay on the judgment. Therefore, the judgment went into effect upon the expiration
15 of the 30-day automatic stay. Accordingly, the Court grants Plaintiff’s Motion for an Order to
16 Show Cause.²

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25 ¹ The Court declines to dismiss Defendant’s motion for reconsideration for want of prosecution. The Court
26 agrees with Defendant that they have taken the necessary steps under the Local Rules required for the disposition of
its motion.

27 ² A district court retains continuing jurisdiction to enforce its own orders even after the case is closed. Hook
28 v. State of Ariz., Dep’t of Corr., 972 F.2d 1012 (9th Cir. 1992) (district court had jurisdiction to enforce consent decree
that had been issued in case that was closed nine years prior).

1 **IV. CONCLUSION**

2 **IT IS THEREFORE ORDERED** that Defendant's Motion for Reconsideration (ECF No.
3 22) is **DENIED**.

4 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Order to Show Cause (ECF No.
5 28) is **GRANTED**. Defendant must show cause in writing by **February 29, 2024** to show cause
6 why the Commissioner has not complied with the order of the Court. This order to show cause will
7 be deemed automatically discharged if Defendants comply with the final judgment of this Court
8 by **February 29, 2024**. Failure to comply with this order may result in the imposition of sanctions.

9 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Status of Case (ECF No. 33) is
10 **DENIED** as moot.

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14 DATED: January 19, 2024



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16 **RICHARD F. BOULWARE, II**
17 **UNITED STATES DISTRICT JUDGE**
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